No. 3106.

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Frank Beyer,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

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The plaintiff in error, hereinafter called the defendant, was jointly with certain other defendants, indicted and convicted under section 2 of the Act of Congress of June 25th, 1910, commonly referred to as "The White Slave Traffic Act."

The section of this act, so far as pertinent to the case at bar, reads as follows:

> "Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate commerce or foreign commerce * * * any

> woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery or to engage in any other immoral practice; or who shall knowingly procure or obtain, or aid or assist in procuring or obtaining any ticket or tickets, or any form of transportation or evidence of the right thereto to be used by any woman or girl in interstate or foreign commerce * * * in going to any place for the purpose of prostitution or debauchery or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice or compel her to give herself up to the practice of prostitution, or to give herself up to the practice of debauchery, or any other immoral purpose, whereby any such woman or girl shall be transported in interstate or foreign commerce * * * shall be deemed guilty"—

of the crime prescribed in said section, and shall be punished accordingly.

I.

Where the Definition of the Offense Created by a Statute Includes Generic Terms, It Is Not Sufficient to Charge the Offense in the Language of the Statute, but It Is Essential That the Indictment Descend to Particulars and Specify the Acts Which Bring the Defendant Within the Purview of the Statute.

The defendants in the case at bar were not charged with transporting, or causing to be transported, women and girls for the purpose of prostitution, which term

has a clearly defined and generally understood meaning. But the indictment is founded upon that part of the above quoted section which, in defining the offense denounced therein, employs the terms "debauchery" and "any other immoral purpose." These words have no technical meaning, but are generic terms, embracing a large class of cases which it was not the intention of Congress to embrace in the statute, and which, indeed, do not constitute any criminal offense at all.

In Gillette v. United States, 236 Fed. 215, the Circuit Court of Appeals for the Eighth Circuit says in regard thereto on page 218:

> "The word debauch is a word of broad signification. It includes all kinds of excessive indulgences in sensual pleasures of any kind, such as gluttony and intemperance."

In Athanasaw v. United States, 227 U. S. 326, the Supreme Court of the United States defines the scope of the term "debauch" in the following language, on page 331:

> "*The term debauch is not a legal or technical term.* (Italics ours.) To debauch is to corrupt in morals or principle; to lead astray morally into dishonest and vicious practices; to corrupt; to lead into unchastity; to debauch. Debauchery then, is an excessive indulgence of the body, licentiousness, drunkenness, corruption of innocence, taking up vicious habits."

The wide range of the words "any other immoral purpose" is apparent from the words themselves.

The rule of criminal pleading is well established that, whenever a statute in defining an offense uses generic

terms, it is not sufficient to charge the offense in the language of the statute, but the indictment must set forth the specific acts which are claimed to bring the defendant within the purview of the statute. The reason for this rule is obvious. A charge in the language of the statute, using generic terms, is not definite and certain enough to enable the court to determine whether or not the acts charged constitute the crime contemplated and denounced by the statute. Nor could the defendant, under such a charge, know what specific accusation he is called upon to meet. In United States v. Cruikshank, 92 U. S. 542, the Supreme Court of the United States, on page 559, says:

> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In United States v. Mills, 7 Pet. 142, this was construed to mean that the indictment must set forth the offense with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged; and in United States v. Cook, 17 Wall. 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms, as in the definition, but it must state the species, it must descend to particulars. 1 Arch. Cr. Pr. and Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable

him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

In People v. Perals, 141 Cal. 581, the Supreme Court of California, at pages 582-3, says in regard thereto:

"While it is the general rule that it is sufficient to charge an offense in the language of the statute, yet this rule is subject to the qualification, that where a more particular statement of facts is necessary in order to charge the offense definitely and certainly, it must be made. The statute may, and often does, define the offense by the use of precise and technical words, which have a well-recognized meaning, or designates and specifies particular acts or means whereby an offense may be committed.

Under such circumstances, to charge the offense substantially in the language of the statute will be sufficient.

When, however, the words or terms used in the statute have no technical or precise meaning, which of themselves imply the offense, or where the particular facts or acts which shall constitute it are not specified, but, from the general language used, many things may be done which may constitute an offense, it is then necessary, in charging an offense claimed to be embraced in the general language of

the statute, to set forth the particular things or acts charged to have been done, with reasonable certainty and distinctness, so that the court may determine whether an offense within the statute is charged, or one over which it has jurisdiction, and so that the defendent may be advised of the particular nature of it, in order to defend against it, and to plead in bar a judgment of conviction or acquittal thereof, if subsequently prosecuted."

II.

The Acts Charged in the Indictment Do Not Bring the Defendant Within the Meaning of the Statute Upon Which the Indictment Is Founded, and Are Neither Within Its Letter Nor Spirit.

After charging the defendants with knowingly transporting and causing to be transported in foreign commerce certain women and girls for the purpose mentioned in the said section of the statute, the indictment proceeds to state the particular acts of which the defendants are accused, as follows:

"For the purpose of acting as entertainers and chorus girls, that is to say, singing and dancing in a certain building in Mexicali, in the Republic of Mexico, which said building would be known as the Owl Cafe, and the ground floor of said building where said women and girls would act as entertainers and chorus girls, as aforesaid, would consist of one large room with a certain space set aside for a gambling hall and a certain space set aside for a bar where intoxicating liquors would be sold, and a certain space set aside for tables and chairs where intoxicating liquors would be drunk,

and leading off from said ground floor of said building there would be two hallways on either side of which said hallways there would be small rooms commonly termed cribs, where various and sundry other women and girls, whose names are to the grand jurors unknown, would engage in the practice of prostitution, that is to say, would engage in sexual intercourse with men other than their husbands, and it would be a part of the duties of said women and girls aforesaid whom the said defendants so conspired to transport as aforesaid as entertainers in said Owl Cafe to sell intoxicating liquors to any and all persons who might desire to buy them, and said women and girls would receive a percentage of forty (40%) per cent on all such intoxicating liquors which they might sell, and to dance with any and all persons who might want to dance with said women and girls, and the women and girls so conspired to be transported as aforesaid, were to entertain and perform as such chorus girls in that part of said building set apart as aforesaid for the bar and gambling tables, and to there perform and entertain in the place, and said girls were to solicit persons in said place, other than the inmates thereof, to buy and drink liquors with the said chorus girls, such liquors to be drunk at the tables provided in said place for said purpose and said girls were to so solicit any and all persons coming into said place to so buy and drink liquor, and said solicitation was to be in the presence of any and all persons there at the time of said solicitation, and in the presence of the said women then and there engaged in prostitution while said prostitutes were in

said part of said place; and the said prostitutes would solicit in the place where said chorus girls were to be, and in their presence, men to go with said prostitutes to said cribs; and said prostitutes and inmates of said place would frequent said compartment thereof in which said chorus girls were to be and entertain, and there would drink intoxicating liquors and procure sales of intoxicating liquors to men congregated there, all in the place where said chorus girls were to so entertain and solicit and stay; and said place would be frequented at all hours of the day and night by men of low character who would congregate there for the purpose of indulgence in intoxicating liquors; and dancing and for the purpose of prostitution; and said chorus girls were to occupy said place and be exposed at all times when in the performance of their said duties there to the company and contact of all said men, and all said prostitutes who would be there congregated."

Independent of the fact that the government did not substantiate by any evidence the essential acts charged therein, as will be more fully discussed hereafter, the indictment utterly fails to disclose any act of commission denounced by the statute. There is no allegation of any act of debauchery or sexual immorality committed by the women or girls alleged to have been transported or of any act of defendants which caused the women and girls transported by the defendant, as alleged, to commit any act of debauchery or other immoral act within the meaning of the statute. Nor is there any allegation that the defendant intended that the acts set out in the indictment should bring about the commission of such acts.

It is established, beyond all doubt, by the decisions of the federal courts, construing the Act of June 25th, 1910, that the words "debauch" and "immoral purposes" refer only to such acts as belong to the same kind and class as are designated by the word prostitution, namely, sexual immorality.

In Suslak v. United States, 213 Fed. 913, the Circuit Court of Appeals for the Ninth Circuit, defining the word debauchery, says on page 917:

> "In the Century Dictionary debauchery is defined as:
>
> 'Excessive indulgence in sensual pleasures of any kind; gluttony; intemperance; sexual immorality; unlawful indulgence of lust.'
>
> So Webster, while giving one of the meanings, seduction from virtue, duty, or allegiance, also defines the term as:
>
> "Excessive indulgence of the appetites, especially indulgence of lust; intemperance, sensuality; habitual lewdness.'
>
> It was in this sense of unlawful indulgence of lust in which the term was intended to be used in the act."

In Athanasaw v. United States, 227 U. S. 326, it is said on page 331:

> "The term debauchery, as used in this statute, has an idea of sexual immorality."

And in Gillette v. United States, 236 Fed. 215, the court says, on page 218, that the word "debauchery" "is used in the statute with reference to immoral sexual relations."

The meaning of the words "immoral purposes" is clearly defined by the Supreme Court of the United States in Caminetti v. United States, 242 U. S. 470. The court in that case quotes from United States v. Bitty, 208 U. S. 393, at pages 486-7, the following language:

> "All will admit that full effect must be given to the intention of Congress as gathered from the words of the statute. There can be no doubt as to what class was aimed at by the clause forbidding the importation of alien women for purposes of 'prostitution.' It refers to women who for hire or without hire offer their bodies to indiscriminate intercourse with men. The lives and example of such persons are in hostility to 'the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all benificent progress in social and political improvement.' Murphy v. Ramsey, 114 U. S. 15, 45. * * * Now the addition in the last statute of the words, 'or for any other immoral purpose,' after the word 'prostitution,' must have been made for some practical object. Those added words show beyond question that Congress had in view the protection of society against another class of alien women other than those who might be brought here merely for the purpose of 'prostitution.' In forbidding the importation of alien women 'for any other immoral purpose' Congress evidently thought that there were purposes in connection with the importations of alien women which, as in the case of

> importations for prostitution, were to be deemed immoral. It may be admitted that in accordance with the familiar rule of *ejusdem generis* the immoral purpose referred to by the words 'any other immoral purpose,' must be one of the same general class or kind as the particular purpose of 'prostitution' specified in the same clause of the statute. 2 Lewis' Sutherland Stat. Const., par. 423, and authorities cited."

And the Supreme Court of the United States adds thereto:

> "This definition of an immoral purpose was given prior to the enactment of the act now under consideration, and must be presumed to have been known to Congress when it enacted the law here involved."

The allegations of the indictment, as quoted above, fall short of stating the essential elements of the offense defined by the statute.

They disclose merely an employment of certain women and girls as entertainers in a cafe, frequented also by prostitutes, and omit to charge that the women and girls were transported for the purpose of committing acts in violation of the White Slave Act. If it was intended to charge the defendants with the consummation of the crime, the facts alleged in the indictment are not sufficient to constitute a violation of the statute without an allegation that acts of debauchery or sexual immorality had been actually committed by the persons transported. In such instance the law might infer therefrom that the defendants intended that the transportation should have that effect. But such inference, as a matter of law, can be made

only if the crime charged had been consummated. The indictment, therefore, under such circumstances, necessarily must set forth the ultimate fact, the essential fact, namely, the consummation of the crime charged.

If, on the other hand, it was intended to charge defendants with an attempt to commit the crime contemplated by the statute, then it must be specifically averred in the indictment that the defendants did the acts set forth in the indictment with the intent to cause the women and girls transported to commit acts of sexual immorality. Without an allegation of such specific intent no crime can be charged, where the acts of debauchery and sexual immorality have in fact not taken place.

We perceive that it was the intention of the prosecution to charge the defendants in the case at bar, not with the consummation of a crime under the White Slave Act, but relying upon the Athanasaw case, reported in 227 U. S. 326, to charge them with an attempt to commit such crime. But in the Athanasaw case (*supra*) the intent to debauch the person transported was expressly charged, and the court in its instructions emphatically stated that the intent of the defendants at the time of the furnishing of the transportation was the very essence of the charge.

It is said in that case on page 330:

> "The intent and purpose of the defendants at the time of the furnishing of this transportation * * * is the very gist and question of this case. Did they intend to induce, or entice, or influence her to give herself up to debauchery? * * * The question here is of intent; what was the intent with which they brought her; * * *?"

It certainly cannot be said that because the employment of women and girls as entertainers might lead some women and girls astray, in the sense of sexual immorality, the defendants, regardless of the fact that they had no intent to bring about such a condition, are guilty of the offense denounced by the White Slave Act.

This act does not and cannot concern itself with the restriction of the employment of women and girls in lawful pursuits, but is intended to prevent persons from transporting and employing women and girls with the specific intent to corrupt their morals in a sexual sense. The intent, therefore, is an essential ingredient of the offense, and must be alleged, and proven as alleged.

The indictment, in the case at bar, is devoid of any allegation of specific intent. It is alleged therein that certain women and girls were transported by the defendants for the purpose of "debauchery" and "other immoral purposes." And this purpose as described in the indictment shows nothing more and nothing else than an employment for a legitimate purpose, to act as entertainers. It nowhere appears from the indictment that there was any intent on the part of the defendants to induce or pursuade thereby the women and girls, alleged to have been transported by them, to commit any act of sexual immorality.

It requires no citation of authorities to show that an indictment must contain a complete, certain and definite charge, and where an attempt to commit a crime is sought to be charged it is essential to set out the specific intent and to state facts showing the intent as a matter of law, as more particularly discussed be-

low. A person cannot be charged with a felony by setting forth facts showing the pursuit of a lawful occupation in the expectation that, perchance, a jury may be found which would regard those facts as sufficient to find the defendant guilty of the crime attempted to be charged It seems needless to pursue this argument further. The indictment in the case at bar does not state an offense under the Act of Congress of June 25th, 1910, and the demurrer of the defendants, interposed to the indictment, should have been sustained.

III.

The Proof Presented by the Prosecution in Support of the Allegations of the Indictment Substantially Varies Therefrom to Such a Degree That They Remain Entirely Unsupported by Any Evidence. The Motion in Arrest of Judgment, Interposed by the Defendants, After Verdict, Therefore, Should Have Been Granted.

The essential allegations of the indictment, describing the offense, specify the purposes for which such women and girls were transported by the defendants, as follows:

"Said girls were to solicit persons in said place, other than the inmates thereof; to buy and drink liquors with said chorus girls, such liquors to be drunk at tables provided in said place for said purpose, and said girls were to so solicit any and all persons coming into said place to so buy and drink liquor and said solicitation was to be in the presence of any and all persons

there at the time of said solicitation, and in the presence of said women then and there engaged in prostitution while said prostitutes were in said part of said place; * * * and said chorus girls were to occupy said place and be exposed at all times when in the performance of their said duties there to the company and contact of all said men, and all said prostitutes who would be there congregated."

The evidence produced by the prosecution not only did not establish that the girls in question solicited persons to buy liquor, but, on the contrary, the evidence conclusively shows that the said girls never asked any one to buy liquor.

Sally Margaret Claxton, a witness called on behalf of the prosecution, testified on her direct examination, in that regard, at page 68 of the transcript of the record, as follows:

"Q. If any men asked you to dance, you would dance with them?

A. Yes, sir.

Q. What, if anything, was done in regard to having the men drink?

A. There wasn't anything done. They danced, and then they went over to a table and sat down.

Q. Would the girls ask them to drink?

A. No, sir."

And the same witness testified, at pages 100-101 of the transcript of the record, as follows [Tr. p. 122]:

"Q. At any time did you ask any man to drink with you while you were there?

A. No, sir.

Q. I will ask you if you asked any man to buy liquor for you? Did you ever do that?

A. No, sir.

Q. You never asked any man to buy any liquor for you at all?

A. No, sir."

Alma Person, a witness introduced on behalf of the prosecution, gave the following testimony in regard thereto, at page 117 of the transcript of the record [Tr. p. 170]:

"Q. By Mr. Palmer: Now when you were dancing, was any effort made—did you make any effort to sell liquors?

A. No, sir.

Q. Did you ever ask any man to buy drinks?

A. No, sir."

So, too, the allegation that the girls in question were at all times exposed to the company and contact of the prostitutes, who would congregate in the cafe, is utterly disproved by the evidence presented in behalf of the prosecution. Alma Person, a witness for the prosecution, testified as follows at page 122 of the transcript of the record:

"Q. Did the girls have separate tables, the chorus girls and these other women?

A. The chorus girls never sat with any of the other women."

And at pages 122 and 123 of the transcript of the record, the same witness testified as follows:

"Q. By Mr. Palmer: Was there any rule of the house that provided that the women who came from the rear of the house should not sit at the same table with the girls who were in the chorus? * * *

A. We were not allowed to even talk to them, to the other women.

Mr. Palmer: Just read the question.

(Question read.)

A. Yes, sir, that was the rule.

Q. That was the rule?

A. Yes, sir."

And on page 129 of the transcript of the record the same witness, Alma Person, testified as follows [Tr. p. 199]:

"Q. During any of your employment down there, we will say at the old place—I will pick that out—did you in any wise associate with or talk with, eat at the same table with, or drink at the same table with any prostitute?

A. No, sir.

Q. Did any of these women whom counsel is calling prostitutes—were any of these women speaking to you, did they speak to you or talk to you in any way?

A. No, sir."

Grace Covert, a witness called on and in behalf of the prosecution, testified on the same issue, at page 148 of the transcript of the record, as follows:

"Q. Now with respect to these women that you were told were there, those prostitutes; at any time did you hold any conversation with any of them?

A. No, sir.

Q. Did you at any time sit down at a table with any of them?

A. No, sir.

[Tr. p. 245]: Q. Or did any of them approach you in any way?

A. No, sir."

There is thus no evidence whatever to sustain the allegations above quoted, and the proof introduced by the prosecution constitutes a material variance from the charge alleged in the indictment. The allegations of exposing the girls in question to contact with prostitutes and compelling them to solicit persons to buy liquor, constitute the main averments upon which the accusation of the defendants' violation of the White Slave Act is based. The other allegations contained in the indictment merely set forth the fact that the girls in question were employed in the cafe of the defendants as entertainers. It is evident that the prosecution having utterly failed to substantiate the charges as laid in the indictment, the variance between the allegations and the proof amounting to a complete failure of proof were material. It was error, therefore, to deny the motion in arrest of judgment.

IV.

The Court Erred in Instructing the Jury in Reference to the Intent and the Proof Required in Order to Establish a Violation of the White Slave Act.

The court charged the jury as follows [Tr. of Record, p. 178]:

"The conspiracy must have involved an intent to violate said act above referred to as the White Slave Act; that is to say, that the defendant intended that the women which they would transport, if any, should be placed in a situation as described in the indictment and hereafter referred to."

And the court further instructed the jury, on page 180 of the transcript of the record, in the following language:

"If the defendants took them into surroundings and environment that would naturally lead to debauchery as aforesaid, then the law is that the defendants intended the natural and necessary consequences of their act."

The White Slave Act is aimed to punish the transportation of women and girls in interstate commerce for the purpose of prostitution or debauchery or for any other immoral purpose within the meaning of the statute, that is to say, for the purpose of practicing sexual immorality. No matter how far the application of this statute might be extended by judicial interpretation, it cannot be applied to cases which are beyond the express terms of the legislative enactment.

The court charged the jury that the statute is violated if the defendants intended to place the women alleged to have been transported by them in a situation as described in the indictment. The indictment describes merely the nature and place of employment for which the women in question are alleged to have been transported. It is not charged in the indictment that those women, being so situated, committed any act of prostitution, debauchery or sexual immorality.

Nor is it charged in the indictment that the defendants pursuaded or induced those women to commit such acts. In other words, the court charged the jury that in spite of the terms of the statute, the White Slave Act is violated where no immoral act denounced by the statute has been committed and that a criminal intent might be inferred from employing women and girls in surroundings which might, perhaps, lead to the commission of sexual immorality, or as the court said, which would naturally lead to debauchery.

The principle of law that a man is presumed to have intended the natural consequences of his act is applicable only to cases in which the crime has been consummated and the acts constituting such crime have been in fact accomplished. The law presumes from the accomplished fact that the accused intended that such fact should occur. But, where the crime has not been consummated there is no basis from which the criminal intent can be inferred. The specific criminal intent is the very essence of an attempt to commit a crime and without it the act is not within the scope of any criminal statute. Indeed, an attempt to commit a criminal offense is an effort to carry out a distinctly formed intent. It is an effort to commit a crime by doing some act towards it with the express intent to consummate the crime, but falling short in its accomplishment.

The distinction between an accomplished crime and an attempt to commit a crime, so far as the determination of guilt depending on the presence or absence of a criminal intent is concerned, has been clearly

stated by the courts whenever this particular question was presented to them. In Commonwealth v. Hersey, 2 Allen (Mass.) 173, the Supreme Court of Massachusetts says, on page 180:

> "The true distinction seems to be this—when by the common law or by the provision of a statute, a particular intention is essential to an offense or a criminal act is attempted but not accomplished, and the evil intent only can be punished, it is necessary to allege the intent with distinctiveness and precision, and to support the allegation by proof. On the other hand, if the offense does not rest merely * * * in an attempt to do a certain act with a wicked purpose, but consists in doing an unlawful or criminal act, the evil intention will be presumed."

In People v. Moran, 123 N. Y. 254, the Supreme Court of New York, on page 257, says:

> "Wherever the *animo furandi* exists, followed by acts apparently affording a prospect of success and tending to render the commission of the crime effectual, the accused brings himself within the letter and intent of the statute. The question whether an attempt to commit a crime has been made is determinable by the *condition of the actor's mind* and his conduct in the attempted consummation of his design."

In the case at bar the consummation of the crime denounced by the White Slave Act was not charged or proven. The indictment manifestly was designed to charge an attempt to violate the act.

Under the instruction of the court above quoted the jury could not help believing and finding that all that is necessary to establish a violation of the White Slave

Act was the proof of the transportation of women and girls in interstate commerce in order to place them in a certain environment without intent, on the part of the defendants, that the environment should cause them to commit acts of sexual immorality and all that the jury is to determine is whether or not the defendants employed the girls in such environment and that it is not necessary to establish the intent of the defendants that acts of sexual immorality should have been committed by the women and girls transported, but that the law presumes the intent.

The learned judge presiding at the trial of this cause probably had in mind the decision rendered in the case of Athanasaw v. United States, 227 U. S. 326, while charging the jury that in order to find the accused guilty under the White Slave Act, it is not necessary that the intended acts of sexual immorality should have been, in fact, committed. But, in the Athanasaw case (*supra*), the court distinctly and emphatically charged the jury that the intent is the very essence of the offense where the acts of debauchery, though intended by the defendants, have not actually been accomplished. The court says there:

> "The intent and purpose of the defendants at the time of the furnishing of this transportation for Agnes Couch is the very gist and question of this case. Did they intend to induce or entice or influence her to give herself up to debauchery? * * * The question here is of intent; what was the intent with which they brought her; that she should live an honest, moral and proper life? or that she came and they engaged and contracted with her for the purpose of her entering upon a

condition which might be termed debauchery, or tends to or would necessarily and naturally lead her to a condition of debauchery just referred to?"

Furthermore, in the Athanasaw case, the defendant was not only charged with a specific intent to induce the girl transported by him to commit acts of debauchery, but his intent to do so and the acts committed by him which tended to bring about such debauchery were affirmatively established by the proof. Notwithstanding these facts, which clearly distinguish the Athanasaw case from the case at bar, the court in that case not only did not tell the jury that the intent may be inferred from the acts committed by the defendant, but expressly explained to the jury that the intent must be established, that the intent is the gist of the offense, and that the defendant, if he did not have the specific criminal intent, could not be found guilty.

It is apparent that under the instructions of the court in the case at bar, above quoted, the determination of the guilt of a person accused under the White Slave Act does not rest upon definite rules of law but upon a vague and indefinite calculation whether a certain environment in which a woman or girl is placed might lead her to sexual immorality. The White Slave Act, however, is a penal statute, having a clearly defined scope which must be strictly followed and considered in order to ascertain whether the statute had been violated. The fact of such violation cannot be left to conjecture or inferences of fact, but is limited to those immoral acts which are denounced by the statute.

V.

The Court Erred in Its Instructions by Omitting to Separate the Law From the Facts Upon Which the Court Expressed Its Opinion to the Jury.

The privilege of the federal judges to express their opinions upon the evidence of the case does not go as far as to authorize an expression of opinion which, coupled with a statement of the law, may mislead the jury in believing that they are bound by the opinion expressed by the court, as to certain facts in evidence.

The Supreme Court of the United States in Starr v. United States, 153 U. S. 614, says in regard thereto on pages 624, 625 and 626:

> "It is true that in the federal courts the rule that obtains is similar to that in the English courts and the presiding judge may, if in his discretion he thinks proper, sum up the facts to the jury. * * * But he should take care to separate the law from the facts and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar providence. McLanahan v. Universal Insurance Co., 1 Pet. 170, 182. As the jurors are the triers of facts, expressions of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments. They should be made distinctly to understand that the instruction is not given as to a point of law by which they are to be governed but as mere opinion as to the facts to which they should give no more weight than it was entitled to. * * * It is obvious that under any system of jury trials the influence of the trial judge on the

jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference and may prove controlling."

The rule as expressed by the Supreme Court of the United States is to be observed with particular strictness in those circuits in which the judges of the state courts are not empowered to comment on the evidence in their instructions to the jury.

It is said in Foster v. United States, 188 Fed. 305, on page 310:

"It should be borne in mind that the judge of the various state courts are not permitted to express an opinion as to the weight of the testimony, nor are they permitted to express an opinion as to the guilt of a defendant. Our people have become accustomed to this system, and as a consequence jurors attach great importance to any expression coming from the presiding judge, feeling, as they do, that it is only in exceptional cases that he expresses an opinion as to any matters that may be submitted to them, and when he does they feel that they are bound by the same.

Under these circumstances an expression of opinion from a federal judge necessarily carries more weight than the opinion of a federal judge in a circuit where a different rule prevails in the state courts. While the learned judge who heard this case below employed language that clearly informed the jury that they were not bound by any expression that he may have made, nevertheless the circumstances surrounding the trial of this case are such as to impel us to the conclusion that the jury was influenced in a large measure by the

> opinion of the court. * * * Notwithstanding the trial judge may express an opinion as to the weight of the evidence * * * in criminal cases, the greatest caution should be used in the exercise of his power, and the jury should be left free and untrammeled in the determination of questions of fact which are to be passed upon by them."

And it has been held that an error in expressing an opinion on a matter of evidence, coupled with a statement of law, is not cured by a disclaimer on the part of the judge in his charge that he has no intention to control the jury by expression of his opinion.

Sandal v. United States, 213 Fed. 569.

In the case at bar the court charged the jury in the following language, pages 180 and 181 of the transcript of the record:

"If the defendants took them into surroundings and an environment that would naturally lead to debauchery as aforesaid, then the law is that the defendants intended the natural and necessary consequences of their act.

If the defendants contracted with the women that they took there, to the effect that said women should not become prostitutes, or engage in prostitution, or if they advised the women what to do in the event they were solicited by men to sexual indulgence, or otherwise approached concerning debauchery; if the defendant guarded and protected said women against being approached concerning debauchery or indulgence in debauchery, to my mind that would be very strong evidence that the defendants knew that the surroundings

and environment in which said women were to be placed would naturally lead to debauchery and immoral sexual relations."

And the disclaimer of invading the province of the jury was expressed by the judge presiding at the trial of this cause in the following words:

"In this instruction I propose to comment to some extent, upon the evidence introduced here, and I tell you that you are not bound by what I shall say concerning the weight to be given to the evidence, nor bound by what I may say that it proves. You must determine that for yourselves. Your right, however, to determine the weight of the evidence and the credibility of the witnesses is not arbitrary, but must be exercised *with legal discretion.*"

It seems manifest that the qualified disclaimer of the court in the case at bar did not cure the error in the construction. The jury was told to pass upon the evidence with a legal discretion, a discretion which the jury can hardly be said to possess, and this statement by the court could readily be understood by the jury to mean that they are called upon to decide the cause in accordance with the interpretation and the evidence as given by the judge, learned in the law.

The instruction above quoted contains a charge on the law, coupled with an expression of opinion on the part of the court, which must have, and undoubtedly did have, the effect upon the jury to mislead them in the belief that the legal conception of the evidence referred to by the court is such as stated in the court's charge, and that, therefore, the jury which must pass

on the evidence as they were told by the court, with legal discretion, is bound to follow the opinion of the court and accept it as their own.

In addition thereto the court in the first sentence of the quoted instruction told the jury that it is the law that if the defendants took the girls in question into surroundings which would naturally lead to debauchery they are presumed to have intended the natural and necessary consequences of their act, and in the following sentence the court said that in its opinion the fact that the defendants contracted with the women not to engage in prostitution is very strong evidence that the defendants *knew* that the surroundings in which the women in question were placed would naturally lead to debauchery. These two statements, one of law and the other expressing the opinion of the court, following as they do one another, are confusing and were calculated to mislead the jury in the belief that knowledge in the sense used by the court is, in the eyes of the law, equivalent to the intent to commit the crime charged.

Moreover the court singled out fragments of the evidence on this point without referring to other evidence presented on the same issue which, taken together, negatives the intent on the part of the defendants to induce the women and girls, alleged to have been transported, to commit acts of sexual immorality. The evidence presented by the government itself shows that the defendants, by their acts, those mentioned by the court, as well as others not referred to by the court, not only did not intend to induce those women and girls to debauchery, but made it impossible for

them to commit any act of debauchery or sexual immorality.

Sallie Margaret Claxton, a witness called by and on behalf of the government, testified as follows, at page 84 of the transcript of the record:

"Q. Were you at any time approached or solicited in any way by any of these defendants, or anybody connected with the Owl Cafe?

A. No, sir.

Q. As a matter of fact, you have said you were told if any man said anything to you that you were to say certain things. As a matter of fact, were you told anything about any protection that would be afforded you? What was said about that?

A. I don't just understand you.

Q. Well, I mean to say, state whether or not you were told anything about being furnished with an escort back and forth, or anything of that kind.

A. No, sir; we were just told to tell them not to bother us."

On page 102 of the transcript of the record the same witness testified as follows:

"Q. Did any of these defendants at any time speak to you about your doing any immoral thing, having any sexual relations with any man?

A. They told us we should never make a date, or anything, with a man.

[Tr. p. 128]: Q. What was said to you with reference to your conduct? What you were to do if any man did, as a matter of fact, make any improper proposals or suggestions to you as respects reporting it?

A. .Tell them that we was not there for that purpose, that there was other people.

Q. And you said, however, that no one ever did make any improper proposal to you?

A. No one ever said anything to me."

Alma Person, another witness called by and on behalf of the government, testified, at page 119 of the transcript of the record, as follows:

"Q. Did you receive any instructions from anyone there in regard to men who solicited you, or if any man should solicit you for sexual relations what you should say?

A. Yes, sir.

Q. What were your instructions?

A. We were not allowed to take a walk or make any appointment with any fellows, and if they asked us anything out of the way, we were to tell them we were not there for that purpose.

Q. And what about the others?

Mr. Rogers: I object to that as leading and suggestive, and I don't think it is competent.

Q. By Mr. Palmer: Was there anything further in regard to what you were to say?

A. No, sir."

On cross-examination Alma Person, the same witness, testified, at page 127 of the transcript of the record, as follows:

"Q. What were your instructions concerning meeting or seeing men or having men talk to you, or anything of that sort?

A. We were not allowed to talk or make appointment, or go out on machine ride, or nothing with nobody.

Q. Did anyone solicit you at any time to do any immoral or indiscreet act?

A. No, sir."

The same witness further testified on cross-examination, at page 133 of the transcript of the record, as follows:

"Q. And during all the times that you have been employed there, have you been permitted at any time to associate with any men, have them come to your rooms, make dates with them, as you call it, appointments with them, or anything of that sort?

A. No, sir."

Grace Covert, another witness called by and on behalf of the prosecution, testified, at pages 147 and 148 of the transcript of the record, as follows:

"Q. Now at any time were you told what you were to do if any man made improper proposals to you or propositions to you? I will change that a bit. Were there officers about through the place there, policemen, guards and one thing another?

A. Yes, sir.

Q. Now you may state whether or not you were directed by the management what to do in case any man said anything to you of an improper nature.

A. Just let him know.

Q. Let the officer know?

A. Yes, sir.

Q. Did any man make any proposals to you of an improper nature while you were there?

A. No, sir."

The evidence thus conclusively shows that the defendants not only had no criminal intent, but on the contrary took steps to prevent a violation of the statute. Assuming for the sake of argument that the defendants knew of the possible consequences of the surroundings in which the women and girls were employed, it is nevertheless proven that such knowledge, if any, was taken advantage of by them not to violate the law, but to make a violation thereof impossible. But it seems at least as reasonable to suppose that the terms of the contracts were founded upon the want of knowledge on the part of the defendants of the character of the girls so employed by them rather than upon the knowledge of the surroundings in which they were to work. The effect of surroundings upon the morality of people cannot be, under any circumstances, definitely foreseen. It depends upon the tendencies, the will power, and the habits of the person placed in a certain surrounding. What might be for one person a natural consequence of a certain environment might have a contrary or no effect at all upon another. The law cannot concern itself with probabilities and put the tendencies of persons on a scale and weigh them in order to determine whether a crime has been committed.

A penal statute must be definite in its application. It cannot reach out and accuse any citizen upon the mere conjecture that perhaps he has brought about a

condition which, though it did not lead to the commission of a crime, might have unintentionally effected a violation of the law.

The indictment in the case at bar and the trial of the cause proceeded upon the theory that the placing of women and girls in surroundings and environment which might naturally lead to debauchery, is sufficient to establish the offense denounced by the "White Slave Act." But it is obvious from the foregoing that where acts of sexual immorality have not been committed, without a specific intent of the defendants to bring about a commission of such acts, there can be no violation of the statute, nor a prosecution thereunder.

In the case at bar the criminal intent is neither charged nor proved.

While it is a matter of judicial history that the application of the White Slave Act has been extended beyond the intention of the Congress, it cannot be doubted that the courts will not apply the statute to cases which do not come within its express terms. Nor will the courts in applying the White Slave Act disregard the fundamental principle that in order to convict a person of an attempt to commit a crime denounced by the statute, there must be a specific intent directed toward the violation thereof.

It is earnestly contended that the errors of the court in overruling the demurrer to the indictment and occurring at the trial of the cause should be corrected by this Honorable Court, that the verdict of the jury rendered herein be set aside and that the judgment and sentence of the court pronounced thereon be reversed.

Respectfully submitted,

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